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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. RAMON PEREYDA et al., Defendant and Appellant.	B206113 (Los Angeles County Super. Ct. No. BA297372)

APPEAL from the judgments of the Superior Court of Los Angeles County, Michael M. Johnson, Judge. Affirmed.

Christine C. Shaver, under appointment by the Court of Appeal, for Defendant and Appellant Ramon Pereyda.

Meredith J. Watts, under appointment by the Court of Appeal, for Defendant and Appellant Victor Ledesma.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Linda C. Johnson and Joseph P. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

The jury found defendants Victor Ledesma and Ramon Pereyda guilty in count one of attempted, willful, deliberate, premeditated murder (Pen. Code, §§ 664 & 187, subd. (a))[1] and in count five of assault with a firearm on a peace officer (§ 245, subd. (d)(1)), both offenses committed upon Officer Michael Fernandez. The jury also found Pereyda guilty in count three of evading an officer (Veh. Code, § 2800.2, subd. (a)(5)). As to counts one and five, the jury found true the allegation that Ledesma and Pereyda personally discharged a firearm within the meaning of section 12022.53, subdivision (c). As to all counts, the jury found true the allegation that the offenses were committed for the benefit of a criminal street gang with the specific intent to promote criminal conduct by gang members, pursuant to section 186.22, subdivision (b)(1)(C). The trial court found that Pereyda had suffered one prior felony strike conviction within the meaning of sections 667, subdivisions (b) through (i), and 1170.12, subdivisions (a) through (d).

Ledesma was sentenced to 35 years to life, consisting of an indeterminate term of 15 years to life for attempted murder and 20 years on the gun enhancement. Pereyda was sentenced to 57 years to life as a second strike offender, consisting of consecutive terms of 30 years to life for attempted murder, 4 years for evading an officer, 3 years on the gang allegation, and 20 years on the gun enhancement.

In this timely appeal, Ledesma contends his Sixth Amendment right to confrontation and cross-examination was violated by the admission of David Mojica's preliminary hearing testimony and the trial court prejudicially erred in admitting Mojica's statements to the police in violation of the hearsay rule. Pereyda contends his consecutive sentences were an abuse of discretion and counsel provided ineffective representation for failing to object to consecutive sentences. Pereyda joins all arguments raised by Ledesma that are applicable to him. We conclude Ledesma forfeited his Sixth Amendment contention regarding admission of Mojica's preliminary hearing testimony

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[1] Hereinafter, all statutory references will be to the Penal Code unless otherwise indicated.

by failure to object on that ground in the trial court, and any error in admitting Mojica's statements to the police was not prejudicial. Pereyda's consecutive sentences were not an abuse of discretion and counsel did not provide ineffective representation. We affirm the judgments.

STATEMENT OF FACTS[2]

Prosecution Case

During the early morning of February 1, 2006, Officer Fernandez was in his patrol car following a Honda, driven by Mojica, that he suspected might be a stolen car. The Honda stopped, three people got out, and the Honda drove away. Mojica, who drove very erratically and appeared to be impaired, continuously flashed gang signs with both hands. Officer Fernandez activated his siren and lights to conduct a traffic stop. Mojica started driving very slowly and eventually pulled over in the breakdown lane at an entrance to the 110 freeway. Officer Fernandez stopped behind him and waited outside his patrol car for backup. As he waited, three gunshots were fired from behind him that nearly hit him and did hit his patrol car. He observed a gray Camry with two people inside accelerating away in the breakdown lane to his left. The passenger's torso stuck out of the window as he pulled his arm back inside the car.

Officer Fernandez followed the Camry in his patrol car with his full lights and full siren activated. He did not see the driver's or passenger's face. There were no other cars ahead of or behind the Camry as the Camry merged onto the freeway. Travelling fast, the Camry exited the freeway at Gage, failed to stop for a red light, and turned onto Gage. The Camry drove in the oncoming lanes of traffic, which caused traffic to swerve

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2 We state the facts in the light most favorable to the judgment. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Osband* (1996) 13 Cal.4th 622, 690.)

out of the way to avoid a collision. Continuing in the opposite lanes of traffic, the Camry went through another red light and made a very wide left turn from the far right hand lane. Officer Fernandez lost sight of the Camry for a "split second" at an intersection but immediately regained sight of the car. No cars obstructed the pursuit. At Hoover and 62nd Street, the Camry suddenly pulled over and stopped.

Defendants got out of the car and were arrested. Pereyda was the driver and Ledesma the passenger. Officer Fernandez listed the Vehicle Code violations that Pereyda committed: he unsafely went from the breakdown lane onto the freeway; he drove too fast on the offramp; he ran the red light on the offramp; he drove on the wrong side of the street; he made a right hand turn at too great a speed against the red light; and he made a left hand turn without a signal, while speeding, and in an unsafe manner.

Officer Ara Hollenback was at the scene when defendants were arrested. Pereyda wore a dark shirt and Ledesma wore a dark, short-sleeved shirt with a long-sleeved white shirt underneath. According to Officer Steven Zaby, the Camry was a stolen car.

A handgun was found along the route of the chase. Ledesma was determined to be a possible contributor to the DNA residue on the gun, whose characteristics are shared by one person in 105,000 Southwest Hispanics. Expert testimony established that one of the rounds extracted from Officer Fernandez's car had been fired from the recovered gun.

Jovan Rivera, a free-lance video journalist, was following Officer Fernandez as he was behind the Honda, when the gray Camry side-swiped Rivera's van. The Camry contained two people, the driver, who was wearing a darker short-sleeve shirt and the passenger, who had white long-sleeves. Rivera went ahead of the Camry. The patrol car stopped behind the Honda. Rivera pulled ahead of the patrol car and the Honda. Rivera observed the passenger of the Camry put his hand out of the car window and then Rivera saw a flash and heard gunshots. Rivera ducked. After the shots were fired, Rivera saw Officer Fernandez pursue the Camry. Rivera followed the pursuit, observing defendants exit the Camry, with the driver in a dark shirt and the passenger in a white sleeved shirt.

Defendants appeared to be the same people he saw in the Camry as it entered the freeway.

A gang expert testified that defendants were members of the Florencia 13 gang, based on their gang tattoos and their admissions in the past to officers who had detained them. The jury was shown evidence of the Florencia tattoos that Ledesma had on his upper chest and hands. The jury was shown evidence of the Florencia tattoos that Pereyda had on his face, back, neck, arms, leg, and fingers. Pereyda was a known associate of Mojica. The officer opined that shooting an officer under the circumstances in this case would benefit Florencia 13 by bolstering the shooter's status in the gang and the gang's status in the community, and creating fear of the gang in the community. The officer also expressed the opinion that it is important for one gang member to back up another gang member who is in trouble.

Defense

No witnesses were presented by defendants.

DISCUSSION

Admission into Evidence of Mojica's Preliminary Hearing Testimony

Ledesma contends that his constitutional right to confrontation and cross-examination was violated by reading Mojica's preliminary hearing testimony to the jury. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15; *Bruton v. United States* (1968) 391 U.S. 123, 126, 137.) He argues he did not have a sufficient and meaningful opportunity to cross-examine Mojica on the statements reflected in the prosecutor's questions because Mojica denied making them. We conclude the contention was forfeited, and in any event, the evidence was not barred by the Confrontation Clause.

A. Mojica's Preliminary Hearing Testimony

Mojica was called to testify at trial but refused, stating he wanted to invoke the Fifth Amendment. Counsel was appointed to advise him. Mojica continued to refuse to testify and was held in contempt. The trial court sustained defendants' objection to requiring Mojica to assert the Fifth Amendment in front of the jury. The trial court declared Mojica an unavailable witness under Evidence Code section 240. Defendants agreed Mojica was unavailable, but objected on hearsay grounds to permitting the jury to hear questions reflecting what Mojica may have said in prior statements to the police.[3] The objection was overruled. Portions of Mojica's preliminary hearing testimony were read to the jury.

In the preliminary hearing testimony read to the jury, Mojica testified that he knew Pereyda but did not know his name. He last saw Pereyda in 2002 in county jail. He had never before seen Ledesma. He testified he had never seen Detective Cox before and had not been interviewed by him. He denied telling Detective Cox that he was in a Honda with defendants and a woman named Silvia when he was pulled over by the police on February 1, 2006, that he dropped off defendants and Silvia when he knew he was being followed by a police car, and that he told defendants when he let them out of the car to watch his back and follow him.

Further, Mojica testified at the preliminary hearing that he and Pereyda were in the Florencia 13 gang, but he did not know Ledesma's gang affiliation. He denied he had testified earlier that morning that he remembered being pulled over on February 1, 2006. He did not remember being pulled over by the police that day. He denied that on February 1, 2006, he was in a car with defendants, let them out of the car after being followed by the police, and told defendants to watch his back. He denied that after they got out of the car, he drove very slowly toward the freeway so defendants could catch up

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[3] Mojica had been interviewed by Detectives William Cox and Dennis English.

with him. He denied that he then got on the freeway and stopped, and defendants pulled up and shot at the officer.

Mojica testified he was high all the time and did not know what happened.

B. Waiver of Contention

Respondent contends Ledesma forfeited the contention that introduction at trial of Mojica's preliminary hearing testimony was barred by the Confrontation Clause of the Sixth Amendment by failing to object specifically on that ground. We agree that Ledesma did not preserve this claim. (*People v. Alvarez* (1996) 14 Cal.4th 155, 186 [a hearsay objection did not preserve a Sixth Amendment Confrontation Clause contention on appeal]; Evid. Code, § 353.) "'"[Q]uestions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal."' [Citations.]" (*People v. Alvarez, supra*, at p. 186.) Here, having failed to specifically or timely make an objection based on the Confrontation Clause, Ledesma forfeited the issue.

C. Admission of Preliminary Hearing Testimony Was Proper

In any event, admission of the evidence did not violate the Confrontation Clause.

In *Crawford v. Washington* (2004) 541 U.S. 36, 68, the Supreme Court held: "Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of 'testimonial.' Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." (Fn. omitted.)

Both requirements—unavailability and a prior opportunity to cross-examine—were met in this case. Ledesma concedes Mojica's refusal to testify rendered him unavailable at trial. Contrary to his contention, Ledesma had a sufficient and meaningful opportunity to cross-examine the witness at the preliminary hearing. Ledesma was a party and was represented by counsel at the preliminary hearing. He had an opportunity to cross-examine Mojica on his testimony, including the opportunity to question Mojica about his answers to the questions about prior statements and his denial he had made those statements. (Compare *Douglas v. Alabama* (1965) 380 U.S. 415, 416-420 [no opportunity at trial or prior to trial to cross-examine witness on his statement to the police].)

The fact that Mojica denied making statements to the police or remembering events, and that Ledesma chose not to cross-examine Mojica, does not establish that Ledesma had no meaningful opportunity to cross-examine Mojica at the preliminary hearing. "'The Confrontation Clause includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion. To the contrary, the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony.' [Citation.] [¶] . . . [¶] . . . '[T]he Confrontation Clause guarantees only "an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."' [Citations.]" (*United States v. Owens* (1988) 484 U.S. 554, 558-559.)

Admission of Mojica's Statements to the Police

Apart from the issue of the admissibility of Mojica's preliminary hearing testimony, Ledesma further contends the trial court erred in admitting Mojica's

statements to the police, because the statements were hearsay and were not admissible as prior inconsistent statements under Evidence Code section 1235. We conclude any error was harmless under any standard.

Defendants objected on hearsay grounds to Detective English's testimony relating Mojica's statements during a police interview about the shooting.[4] The trial court overruled the objection, stating these were prior inconsistent statements that Mojica was asked about at the preliminary hearing but denied making. "So now this is the actual evidence of the statements." The evidence was admitted without a limiting instruction.

Detective English testified that he and his partner, Detective Cox, interviewed Mojica on February 20 and 21, 2006. Mojica told them what happened the night of the shooting. Mojica stated he, Victor, and Ramon were members of Mojica's gang. Mojica was pulled over by the police on February 1, 2006. Prior to being pulled over, he knew he was being followed by the police, and he dropped off defendants and two girls, telling defendants to watch his back. In the second interview, Mojica denied he had told defendants to watch his back. Mojica stated he was weaving all over the lanes. Mojica did not want the police to stop him, because he was intoxicated and afraid he would be arrested for a parole violation. Mojica was stopped on the offramp by the police and heard gunshots. He did not know where they came from. He thought he was being shot at.

Evidence Code section 1235 provides: "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony *at the hearing* and is offered in compliance with Section 770.[5]"

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4 As defendants objected on hearsay grounds, we do not agree with respondent that the contention was forfeited.

5 Evidence Code section 770 provides: "Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony *at the hearing* shall be excluded unless: [¶] (a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the

(Emphasis added.) "'The hearing' means the hearing at which a question under this code arises, and not some earlier or later hearing." (Evid. Code, § 145.)

As respondent acknowledges, the evidence was not admissible under the prior inconsistent statement exception (Evid. Code, § 1235) to the rule against hearsay, because Mojica did not testify at the hearing at which the evidence of his prior statements was offered. (See *People v. Rojas* (1975) 15 Cal.3d 540, 548 [the witness's prior testimony was not admissible as a prior inconsistent statement under Evidence Code section 1235, because he "did not testify at the hearing at which the question of admissibility of the testimony arose"]; accord, *People v. Williams* (1976) 16 Cal.3d 663, 669 ["Morris not having testified at trial -- the hearing at which the admissibility of his prior inconsistent statements arose -- those statements were not inconsistent with his testimony 'at the hearing.'"]; *People v. Schmaus* (2003) 109 Cal.App.4th 846, 858 ["Schmaus's statement was not admissible as an inconsistent statement, for Schmaus did not testify"].) Respondent argues that Ledesma's contention is akin to invited error, in that the reason Mojica did not "testify" at trial was defendants objected to requiring that Mojica assert the Fifth Amendment in front of the jury. We reject this argument: Ledesma objected to the admission of Mojica's prior statements; he did not invite it.

A. Harmless Error

Ledesma states that Mojica's prior statements to the police were also barred by the Confrontation Clause. We need not decide that issue, because, apart from whether the Confrontation Clause was violated, the error in admitting the evidence was harmless under any standard. (Cal. Const., art. VI, § 13; *People v. Watson* (1956) 46 Cal.2d 818, 836; *Chapman v. California* (1967) 386 U.S. 18, 24.) "'[I]f the properly admitted

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statement; or [¶] (b) The witness has not been excused from giving further testimony in the action." (Emphasis added.)

evidence is overwhelming and the incriminating extrajudicial statement is merely cumulative of other direct evidence, the error will be deemed harmless.' [Citations.]" (*People v. Schmaus*, *supra*, 109 Cal.App.4th at p. 860.) Such was the case here.

The challenged testimony was admitted to prove Ledesma was the shooter and the gang enhancement. However, those matters were conclusively established by evidence independent of Mojica's hearsay statements.

Ledesma's identity as the shooter was established by DNA and other evidence linking him to the gun that fired the rounds and by his arrest in the Camry that Officer Fernandez and Rivera had followed from the scene of the shooting. Moreover, when arrested following his flight from the scene, he was wearing the white long-sleeved shirt that Rivera described the shooter wore. We disagree with the contention there was scant evidence to support a finding of intent to kill in the absence of the hearsay statements. The evidence that three gunshots were fired at Officer Fernandez, nearly hitting him and damaging his patrol car, compels the conclusion that the shooter intended to kill the officer.

Regarding the gang enhancement, Mojica testified at the preliminary hearing that he belonged to Florencia 13. Defendants' membership in this gang was established by the Florencia 13 tattoos on their bodies, Mojica's testimony that Pereyda was a member, and expert testimony that defendants were members based on their tattoos and prior admissions to the police. Nonhearsay evidence supported finding that a desire to protect a fellow gang member from being arrested for driving under the influence motivated the shooting: Officer Fernandez established that Mojica was driving very erratically and appeared to be impaired, Mojica dropped off two men while Officer Fernandez was following him, Mojica drove very slowly after dropping off the two men as if to give them time to catch up, and two men arrived at the scene of the traffic stop and shot at the officer. Even without this motive, the gang purpose of the shooting was established by expert testimony not based on the hearsay evidence: shooting a police officer would

bolster the shooter's status in his gang and the gang's status in the community, and create fear of the gang in the community.

In light of this overwhelming evidence and the merely cumulative nature of the hearsay statements, any error in admitting Mojica's hearsay statements was harmless.

Pereyda's Consecutive Sentence

The trial court sentenced Pereyda to consecutive terms on the convictions of attempted willful, deliberate, premeditated murder and evading an officer, because "[evading an officer] was a separate crime with separate harm to the general public." (§ 1170, subd. (c) [the "court shall state the reasons for its sentence choice on the record at the time of sentencing"].) Pereyda contends the consecutive sentence was an abuse of discretion, because the trial court failed to consider the factors relevant to consecutive and concurrent sentencing in California Rules of Court, rule 4.425. The trial court did not abuse its discretion.

California Rules of Court, rule 4.425 lists "[c]riteria affecting the decision to impose consecutive rather than concurrent sentences." "The provisions of rule 4.425 are merely 'criteria affecting the decision to impose consecutive rather than concurrent sentences[.]' They are guidelines, not rigid rules courts are bound to apply in every case." (*People v. Calderon* (1993) 20 Cal.App.4th 82, 86-87.) The trial court is directed by rule 4.425 to consider whether the crimes were independent of each other, involved separate acts of violence or threats of violence, and were committed at different times or separate places.

The decision whether to impose concurrent or consecutive sentences is within the discretion of the trial court. (§ 669; *People v. Bradford* (1976) 17 Cal.3d 8, 20.)[6] "'A

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[6] Section 669 provides in pertinent part: "When any person is convicted of two or more crimes, whether in the same proceeding or court or in different proceedings or courts, and whether by judgment rendered by the same judge or by different judges, the second or other subsequent judgment upon which sentence is ordered to be executed shall

trial court's discretionary act is accorded great weight on appeal: It "will not be disturbed unless it is abused, i.e., the appellate court will not substitute its own view as to the proper decision." [Citation.] To warrant reversal the record must suggest "'a manifest miscarriage of justice.'" [Citation.]' [Citation.] Although its discretion is very broad, a trial court may not act arbitrarily or capriciously. [Citation.] However, '[in] the absence of a clear showing that its decision was arbitrary or irrational, a trial court should be presumed to have acted to achieve legitimate objectives and, accordingly, its discretionary determinations ought not to be set aside on review. [Citations.]' [Citation.]" (*People v. Arviso* (1988) 201 Cal.App.3d 1055, 1059.)

After the shooting at Officer Fernandez and in order to evade capture, Pereyda drove at a high rate of speed into lanes of oncoming traffic, ran red lights, and made unsafe turns. The potential for harm from Pereyda's driving was independent of the potential harm to Officer Fernandez from the shooting. The objectives in the shooting and evading were separate. The offenses took place at separate times and places, as Pereyda attempted to escape capture by his flight from the shooting scene. Given his conduct, Pereyda's argument that consecutive sentences were an abuse of discretion is devoid of merit.

As the trial court's discretionary sentencing choice is unassailable, Pereyda's contention that counsel was ineffective in failing to object to the order for consecutive sentencing necessarily falls for lack of a showing of prejudice.[7]

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direct whether the terms of imprisonment or any of them to which he or she is sentenced shall run concurrently or consecutively."

[7] "To secure reversal of a conviction upon the ground of ineffective assistance of counsel under either the state or federal Constitution, a defendant must establish (1) that defense counsel's performance fell below an objective standard of reasonableness, i.e., that counsel's performance did not meet the standard to be expected of a reasonably competent attorney, and (2) that there is a reasonable probability that defendant would have obtained a more favorable result absent counsel's shortcomings." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003.) A reviewing court need not determine whether counsel's performance was deficient before examining whether the defendant

DISPOSITION

The judgments are affirmed.

KRIEGLER, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.

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suffered prejudice as a result of alleged deficiencies: "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." (*Strickland v. Washington* (1984) 466 U.S. 668, 697.)